Petition

Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM SOLTERO,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Daniel F. Cracchiolo
2333 N. Central Avenue
P.O. Box 13528
Phoenix, Arizona 85002
Telephone (602) 252-7701

Counsel of Record

August 27, 1981

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit properly rule that union authorization and union benefit were not elements that the United States Government must prove in a theft/embezzlement type crime as set forth in 29 U.S.C. § 501(c)?

2. Was the defendant, William Soltero, entitled to a judgment of acquittal, or in the alternative, the granting of his Motion for New Trial?

Table of Contents

	Page
Opinion Below.....	2
Jurisdiction.....	2
Statutory Provision Involved.....	2
Statement of the Case.....	4
Reasons For Granting The Writ....	5
1. The Decision Below Is In Conflict With the Decisions of Other Federal Courts of Appeal Regarding the Proper Interpretation of the Landrum-Griffith Act, 29 U.S.C. § 501(c)(1976) and is in Direct Conflict With the Plain Meaning of the Statute As to Call For an Exercise of This Court's Power of Supervision.....	5
Conclusion.....	22
Appendix (Memorandum Decision and Judgment of the Court of Appeal).....	App. A
(Denial of Petition for Rehearing.....	App. B

Table of Authorities

Cases:	Page
McNamara v. Johnston, 360 F. Supp. 517 (N.D. Ill. 1973)	16, 17
United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980)	8, 9
United States v. Bane, 583 F.2d 832 (6th Cir. 1978), cert. denied, 427, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979)	15
United States v. Dibrizzi, 393 F.2d 642 (2d Cir. 1968).	13, 14
United States v. Durnin, 632 F.2d 1297 (5th Cir. 1980)	8, 9
United States v. Marolda, 615 F.2d 867 (9th Cir. 1980).	8
United States v. Nell, 526 F.2d 1223 (5th Cir. 1976)	11
United States v. Silverman, 430 F.2d 106 (2d Cir. 1970) cert. denied, 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971)	18
United States v. Thordarson, No. 80-1239, slip op. (9th Cir. May 20, 1981)	8, 18

Statutes:	
29 U.S.C. 501(A)(1976)	15
29 U.S.C. 501(C)(1976)	2, 3, 6, 7, 8, 14, 15-17, 19

Page

Congressional Record:

105 CONG. REC. 14,356 (1959). . . . 17

105 CONG. REC. 17,900 (1959). . . . 16

OPINION

The opinion of the court of appeals (Appendix A) is a memorandum decision of the United States Court of Appeals for the Ninth Circuit. A petition by defendant William Soltero for a rehearing was subsequently denied (Appendix B).

JURISDICTION

The judgment of the court of appeals (Appendix A), infra, was entered on May 14, 1981, with the denial of the Motion for Rehearing entered on July 27, 1981. This Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and United States Supreme Court Rule 20.1, 28 U.S.C..

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 501(c) (1976):

> Any person who embezzles, steals, or unlawfully and

> willfully abstracts and converts to his own use, or use of another, any of their monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00, or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The grand jury issued a sixteen count indictment against defendant, William Soltero, on June 1, 1979, charging the defendant with conspiracy (Count One) and various allegations of Landrum-Griffith Act violations, 29 U.S.C. § 501(c) (Counts Two through Sixteen).

Trial on the matter commenced on September 17, 1979. On September 18, 1979 the Government dismissed Counts Twelve and Thirteen. On October 1, 1979, the government rested. The defendant's

Motion for Judgment of Acquittal was argued and the Court granted the motion as to Count Fourteen dismissing it.

On October 15, 1979, the defendant rested. The defendant renewed his Motion for Judgment of Acquittal which was denied. On October 19, 1979, the jury returned its verdict finding the defendant not guilty on Counts Four, Five, Six, Seven, Eight, Ten, Eleven, Fourteen, Fifteen and Sixteen, deadlocking on Count One and finding the defendant guilty on Counts Two, Three, and Nine. Count One of the indictment was dismissed by the government on December 17, 1979.

Motions for new Judgment of Acquittal, and in the alternative, Motions for New Trial were filed and argued. The Motions were denied by the District Court on December 7, 1979. The court entered its sentence on December

17, 1979, holding defendant Soltero for four years probation to run concurrently with supervision and a fine of $5,000.00 and restitution to the union of the money as set forth in Count Two ($44.53), Count Three, ($93.27) and Count Nine ($6,000.00). Notice of Appeal to the Ninth Circuit was filed on December 26, 1979. The Ninth Circuit affirmed the convictions by Memorandum Opinion filed on May 14, 1981. A Motion for Rehearing was timely filed. This motion was denied on July 27, 1981.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With The Decisions Of Other Federal Courts Of Appeal Regarding The Proper Interpretation Of The Landrum-Griffith Act, 29 U.S.C. § 501(c) (1976) And Is In Direct Conflict With The Plain Meaning of The Stature As To Call For An Exercise Of This Court's Power Of Supervision.

The Ninth Circuit improperly eliminated authorization as an element the

government must prove to obtain a conviction under 29 U.S.C. § 501(c) (1976). The Ninth Circuit appears to be the first court to hold that lack of authority to expend funds is not an element which the prosecution must prove in a theft/embezzlement type statute. This holding is clearly erroneous and was never intended by Congress under 29 U.S.C. § 501(c). The specific language in the statute defines the offense as "embezzling", "converting", or "stealing".

The holding of the Ninth Circuit is non sequitur. How can an individual steal, convert, or embezzle funds of another if he expends those funds as authorized by his principal? There simply is no crime committed when the expenditure is authorized. Moreover, there has not been a single case prior to

this instant decision that counsel can find where a court has held that lack of authority is not an element of such a crime. Most important, however, is common sense analysis which illustrates that one cannot take another's property when using it in an authorized manner.

Review of this matter to determine the elements of an offense of 29 U.S.C. § 501 (c) is therefore essential. There is great confusion in all the circuits as to the proper 501 (c) elements which the government must prove. The basis for this confusion is perhaps the ad hoc basis of each appeal, where the reviewing court never explored the full scope of the statute due to the factual peculiarities of each individual case on appeal. A precise analysis of the confusion among the circuits concerning the elements of this crime is set forth in United States

v. Marolda, 615 F.2d 867, 869-870 (9th Cir. 1980).

The Ninth Circuit's attempt to analyze this case law can be traced from Marolda, 615 F.2d 867, through United States v. Andreen, 628 F.2d 1236, 1242 (9th Cir. 1980), to United States v. Thordarson, No. 80-1239, slip op. (9th Cir. May 20, 1981), which was decided at or near the same time as the present decision. The Ninth Circuit now holds that authorization is not an element that must be proved under 501(c). By reaching this result, the Ninth Circuit improperly interpreted the statute and prior case law both from its jurisdiction and other circuits. In reaching this analysis the Ninth Circuit relied primarily upon United States v. Andreen, 628 F.2d 1236 and United States v. Durnin, 632 F.2d 1297, 1300 (5th Cir. 1980).

In neither of these cases, nor in fact in any case decided by any circuit to date, when a factual analysis is made of the cases, has any affirmance been granted where the government has not in fact proved that authorization was not present. For example, in Andreen, 628 F.2d at 1242, the Ninth Circuit specifically noted that the expenditures were not in fact authorized. In Durnin, 632 F.2d at 1299, an analysis of the facts show that the defendant had no true authorization to receive double reimbursement for expenditures, even though he had been authorized to receive reimbursement for his business expenses.

The problem in the circuit courts' analysis of this statute is perhaps due to a failure of any court to properly enunciate and evaluate "authorization" in context of a union organization in rela-

tionship to its structure as a labor organization and its purposes, i.e., the union's purpose or benefits which accrue to it.

Authorization, for union expenditures, concerns two interdependent elements: (1) procedural authority and (2) purpose authority, or by analogy to a corporation or governmental body, ultra vires acts. The second element of authority, purpose authority, is determined by addressing the governing statutes and union constitution. The proper question therefore becomes: Is the expenditure, if properly authorized procedurally, one allowed by

the union constitution.?[1] Once a determination is made that an act is not prohibited as ultra vires, one must look at procedural authority.[2] Procedural authority is established by a union's constitution and common law. These sources provide the framework for obtaining approval for expenditures. Such authori-

---

[1] United States v. Nell, 526 F.2d 1223 (5th Cir. 1976) cert. denied, 439 U.S. 1127, 99 S.Ct. 1044, 59 L.Ed.2d 88 (1979) shows the interplay between constitutional authority and procedural authority. The union constitution provided a procedure to authorize union payment of officer's personal expenses. The procedure was not followed. Therefore, the act was unauthorized procedurally, even though ultra vires act. If the union had no constitutional provision which either broadly or by more express language would have allowed payment of personal expenses or making of gifts to officers, the act could have been ultra vires and therefore not authorized, even though the membership had procedurally authorized it by secret ballot vote.

[2] None of the acts alleged against Soltero are ultra vires, nor has the government so contended.

zation, as with a corporation, is three-fold and involves with each expenditure an analysis of the amount of the expenditure, its nature, and purpose. At this point "union benefit" or "union purpose" becomes inextricably part of the authorization formula. The two levels of expenditures are as follows:

(1) Requiring membership approval. These are certain large, unusual expenses that are not expended in the ordinary course of business. These would be analogous to matters that need shareholder action in a corporation, for example, a purchase or disposal of all or substantially all of the assets of the corporation not in the ordinary course of business.

(2) Actions needing board approval. These expenses are more routine activities not part of everyday union business.

These actions are actions analagous to activities needing board of director approval in a corporation, and

(3) Officer authority. These acts are the acts which an officer can and must exercise his authority in everyday activities of the union. The officer is given both express and implied authority to incur certain expenditures. There are, however, limits on this power. The limit on this power, unless there is express authority to the contrary either by constitution or appropriate resolution, is union benefit.

This interplay regarding officer authority and its relationship to union benefit can be seen by a factual analysis of United States v. Dibrizzi, 393 F.2d 642 (2d Cir. 1968). Dibrizzi had authority to incur union related business expenditures. However, when he sought to

seek reimbursement for his own personal expenses rather than union benefit, he acted outside his express and implied authority.[3]

An officer of a labor organization by nature of his office has authority to commit the union he represents to certain expenditures. A violation of 501(c) occurs only when he steps outside this authority with fraudulent intent. Union benefit becomes an element in cases involving the third category of authority since the officer's inherent powers are to expend funds for union purpose. The more remote the union purpose and the more significant the personal aspect of the expenditure, the more likely the

---

[3] Dibrizzi also illustrates that authority obtained by fraud is in fact no authority at all. The government may always prove that procedural authority actually obtained is in fact ineffectual because of fraud or failure to disclose facts.

officer must act with a higher level authority -- either executive board approval or membership approval for actual authority to exist. This dichotomy is touched upon in United States v. Bane, 583 F.2d 832, 835-836 (6th Cir. 1978).

Irregardless, the government must be required by statute to prove lack of authorization as an element of a § 501(c) criminal violation. The labor unions do not require a stricter standard for criminal violations for their protection, nor is it required by the statute or its legislative history.[4]

---

[4] Section 501(a) with its broader civil sanctions, provides adequate protection to union coffers. This section allows either union members, or the Department of Labor to bring an action to recover funds, if a breach of fiduciary duty in the civil context has occurred.

The legislative history of the statute clearly establishes that authorization was intended to be an element that the government must prove. Senator John Kennedy, speaking during the Congressional debates, noted that the act does not apply to authorized expenditures. He stated: "Union officers will not be guilty of a breach of trust under this section when their expenditures are within the authority conferred upon them either by constitution or by resolution of the executive board, convention, or other appropriate governing body (including a general meeting of the members) . . . " 105 CONG. REC. 17,900 (1959) [cited in McNamara v. Johnston, 360 F. Supp. 517, 523 (N.D. Ill. 1973)]. Likewise, Congressman O'Hara, one of the leading proponents of the statute in the House of Representatives emphasized:

> Nor is it our intention that the court, state or federal, or other government agency, shall second guess union officers and employees on questions of whether a particular investment or expenditure is included within the special problems and functions of a labor organization. If it has been made in accordance, and for a purpose permitted by the constitution, bylaws or regularly adopted resolution of the union's constitutional governing body, the officer employee shall not be required at his peril to determine whether or not the constitution, bylaw or resolution, goes beyond a legitimate purpose and objective of the organization. To do this would place them in an impossible position, and would paralyze legitimate operations of the union.

105 CONG. REC. 14,356 (1959) [quoted in McNamara, 360 F. Supp. at 524.]

It is respectfully submitted that the government must be required to prove lack of authorization as an element of this "larceny" type statute. To hold otherwise, as the Ninth Circuit has done,

stretches the statute to ludicrous extremes. The Ninth Circuit effectively now holds that a union official may be convicted of a felony, even if the expenditure is authorized and for a union purpose, if the government can convince twelve lay people that the officer spent the funds "knowing the union would not have wanted that done". Even the adoption of this language in United States v. Thordarson, No. 80-1239, slip op., which the Ninth Circuit borrowed from United States v. Silverman, 430 F.2d 106, 127 (2d Cir. 1970) cert. denied, 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971) contradicts the court's holding in that opinion. Obviously, if an expenditure is authorized it is an expenditure that

the union would have desired to be made. Therefore, to prove that "the union would not have wanted the expenditure made," the government, even by this standard, must establish at a minimum a lack of authorization.

More important is the effect of the Ninth Circuit's holding not only upon William Soltero, the defendant herein, but on labor leaders in general who are now placed in jeopardy of being second guessed by federal officials for making expenditures that are authorized.

It is respectfully submitted that lack of authorization is a threshhold element and must be proved by the government in any 501(c) case. This element is necessary to prevent government substitution of its own judgment of union policies with which the prosecutor disagrees. Such a standard preserves the right of a

labor organization to determine its own destiny, but at the same time allows protection of its coffers from truly criminal acts.

The application of this ruling by the Ninth Circuit to defendant William Soltero is appalling. Although the facts are slightly more complicated than this, briefly, in Counts Two and Three of the Complaint, the government charged and obtained convictions of William Soltero, who exercised his discretion as an officer of the local union under "officer authority" by authorizing the expenditure of $44.52, and $93.27 to provide expenses for a young woman to appear in an audition with the American Repertory Theater upon request from a member of a recognized Arizona civic organization.

Count Nine of the indictment relates to a union expenditure of $6,000.00 to settle a civil suit for which the union could have faced a large expenditure of attorneys' fees, and potential actual and punitive damages. William Soltero was acquitted on Counts Four through Eight of this indictment which involved the expenditure of attorneys' fees to defend a criminal action relating to the same incident. Analysis of the evidence will establish that the same resolution authorizing the expenditure for defense in the criminal matter also authorized the settlement of the civil suit, a settlement which was substantially more beneficial to the union than was the expenditure of funds to defend criminal

actions against its business agents who were involved in the criminal matter.

A complete review of the report will establish the Ninth Circuit improperly interpreted the elements of 29 U.S.C. § 501(c), and that a proper interpretation of the law applied to the facts of this case would require a judgment of acquittal.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit.

Respectfully submitted this 27th day of August, 1981.

Burch & Cracchiolo, P.A.

By _____
Daniel F. Cracchiolo
2333 North Central Avenue
P. O. Box 13528
Phoenix, Arizona 85002

Counsel of Record
for Petitioners

August 27, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 80-1013
v.	)	D.C. No. CR 79-138-1
WILLIAM SOLTERO,	)	
Defendant-Appellant.	)	MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, Chief Judge, Presiding
Argued and Submitted October 10, 1980

Before: KENNEDY and NORRIS, Circuit Judges,
and McNICHOLS,* District Judge

Appellant William Soltero, the business manager and secretary-treasurer of a union local, was convicted of three counts of embezzlement from his union under the Landrum-Griffith Act, 29 U.S.C. § 501(c). Soltero argues on appeal that

* The Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

the evidence was insufficient; the jury was improperly instructed; the trial court erred in excluding evidence; the prosecution engaged in prejudicial misconduct; the indictment was deficient; the trial court erred in refusing to dismiss for pre-indictment delay; the statute is void for vagueness; and the statute denies equal protection. We affirm on each of the three counts.

Sufficiency of the Evidence

The appellant contends that for each of the three counts on which he was convicted, the government failed to present substantial evidence of three essential elements of § 501(c): lack of union purpose, lack of authorization, and fraudulent intent. This circuit has recently established that neither lack of union purpose nor lack of authorization is an essential element of §501(c).

United States v. Thordarson, No. 80-1239, slip op. at ___ (9th Cir. ____, 1981). See also United States v. Andreen, 628 F.2d 1236, 1242 (9th Cir. 1980); United States v. Durnin, 632 F.2d 1297, 1300 (5th Cir. 1980). The issue before us is thus whether there is sufficient evidence of fraudulent intent. In reviewing the sufficiency of the evidence, we are limited to determining whether the trier of fact was presented with substantial evidence of guilt beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Jacobo-Gil, 474 F.2d 1213, 1214 (9th Cir. 1973).

Upon reviewing the record, we find that with regard to Counts II and III of the indictment, there is substantial evidence that the defendant arranged for the expenditure of union funds for his own

private benefit, "knowing that the (union) would not have wanted that done." Thordarson, slip op. at _____; Andreen, 628 F.2d at 1241. With regard to Count IX, we find that there is substantial evidence that the defendant converted union funds to his personal use, and purposefully acted in contravention of union procedures to forestall objections by the union membership. We therefore find the evidence sufficient to convict the defendant on all three counts.

Void for Vagueness

Soltero argues that §501(c) is void for vagueness as it was applied to this case. A criminal statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954).

Section 501(c) easily meets this test both in the abstract and under the facts of this case. The section is a simple "larceny-type" statute, Thordarson, slip op. at ___; the conduct for which the defendant was convicted, converting union funds to his own personal use, is clearly within the plain meaning of the statute. We therefore uphold § 501(c) as not unconstitutionally vague.

Exclusion of Evidence

The defendant contends the trial court improperly excluded evidence of the findings of a hearing held by the International Union concerning the Tucson incident. Evidentiary rulings by the trial court are not to be disturbed absent a clear abuse of discretion. See United States v. Passaro, 624 F.2d 938, 943 (9th Cir. 1980); United States v. Kearney, 560 F.2d 1258, 1269 (9th Cir.),

cert. denied, 434 U.S. 971 (1977). As the evidence was of questionable relevance, we cannot find that the trial court abused its discretion.

The defendant also contends that the trial court erred in excluding certain testimony as hearsay. Again, we find that the trial court did not abuse its discretion. The testimony was hearsay and did not fall under any of the standard exceptions to the hearsay rule. Nor was there any compelling reason to apply the residual exception to the hearsay rule. See Fed. R. Evid. 803(24).

Jury Instructions

Soltero maintains that the jury instructions were improper in two respects: the court refused to instruct the jury regarding the interpretation of union affairs by union officials, and the court gave instructions relating to false

vouchers. We find no error on the part of the district court with regard to these instructions. Although it may not have been necessary, since lack of authorization is neither an essential element of § 501(c) nor charged in the indictment, the trial judge gave instructions on union authorization which we find quite fair. In light of these instructions, the trial judge's refusal to give the requested instruction on union affairs was well within his discretion. The court's instruction regarding false vouchers was appropriate in light of the evidence taken as a whole, and did not improperly focus the jury's attention on one part of the totality of the evidence.

Other Issues

The defendant raises a number of other issues, but none of merit. The

alleged prosecutorial misconduct was not in any event so prejudicial as to require a mistrial, and so the denial by the trial judge of the mistrial motion was not error. The trial court's refusal to strike portions of the indictment did not, in light of the jury instructions, prejudice the defendant. The defendant did not demonstrate the specific prejudice necessary to warrant a dismissal for pre-indictment delay. See United States v. Pallan, 571 F.2d 497 (9th Cir. 1978); United States v. Mays, 549 F.2d 670 (9th Cir. 1977). Finally, the defendant argues that § 501(c) violates the equal protection and due process clauses because it does not provide for lesser penalties for small embezzlements as do other federal embezzlement statutes. We find the discrimination reasonably related to the proper government objec-

tive of combatting corruption in labor unions. See Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

For the reasons given above, the judgment is AFFIRMED.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 80-1013
v.	)	D.C. No. CR 79-138-1
WILLIAM SOLTERO,	)	
Defendant-Appellant.	)	JUDGMENT

APPEAL from the United States District Court for the District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 14, 1981.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 80-1013
v.	)	D.C. No. CR 79-138-1
WILLIAM SOLTERO,	)	
Defendant-Appellant.	)	ORDER

Before: KENNEDY and NORRIS, Circuit Judges, and McNICHOLS*, District Judge

Appellant's petition for rehearing is DENIED.

* The Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 29 1981
STEVAS,
CLERK

No. 81-402

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM SOLTERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether lack of union authorization is an essential element of the offense of embezzlement of union funds under the Landrum-Griffith Act, 29 U.S.C. 501(c).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

United States v. *Bane*, 583 F. 2d 832, cert. denied, 439 U.S. 1127 8

United States v. *Durnin*, 632 F. 2d 1297 7

United States v. *Goaa*, 490 F. 2d 1158, cert. denied, 417 U.S. 945 7

United States v. *Marolda*, 615 F. 2d 867 ..... 6, 7

United States v. *Silverman*, 430 F. 2d 106, modified on other grounds, 439 F. 2d 1198, cert. denied, 402 U.S. 953 7

United States v. *Thordarson*, 646 F. 2d 1323, petition for cert. pending, No. 81-643 ..... 4, 6, 7, 8

Statute:

Landrum-Griffith Act, 29 U.S.C. 501(c) 1-2, 3, 4, 5, 6, 8

Page

Miscellaneous:

105 Cong. Rec. 17900 (1959) 7

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-402

WILLIAM SOLTERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A9) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on May 14, 1981. A petition for rehearing was denied on July 27, 1981. The petition for a writ of certiorari was filed on August 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Landrum-Griffith Act, 29 U.S.C. 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts and converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of

which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00, or imprisoned for not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner, the business manager and secretary-treasurer of a union local, was convicted on three counts (Counts II, III and IX of the indictment) of embezzlement of union funds, in violation of 29 U.S.C. 501(c). He was sentenced to four years' probation, fined $5,000, and ordered to make restitution. The court of appeals affirmed (Pet. App. A1-A9).

1. The evidence relating to the counts upon which petitioner was convicted showed that in September 1974 petitioner met a young woman in his Phoenix, Arizona, office who was attempting to obtain transportation from Phoenix to San Francisco, California. She had been referred to petitioner by a mutual acquaintance, who told her that petitioner and another union official would be making a trip from Phoenix to Los Angeles by automobile and that she could accompany them. Petitioner, however, advised the woman that the party would be traveling by plane and that, because the trip had been prearranged, she would not be required to pay her own airfare (5 Tr. 14-17). During the ensuing flight, petitioner repeatedly attempted to persuade the woman to remain with him in Los Angeles for the purpose of "party[ing] and go[ing] out dancing and things like that" (*id.* at 20-21, 33). Unbeknownst to the woman, petitioner had also made a hotel reservation for her in Los Angeles. The woman declined petitioner's suggestion that she remain with him overnight; but when the two arrived in Los Angeles, he purchased for her a plane ticket providing transportation to San Francisco and a return to Phoenix (*id.* at 21-22; 6 Tr. 120). The airline tickets and the hotel

reservation for the woman were all charged to, and paid from, the union account over which petitioner had control; and the airline reservations were made in the name of a male rather than a female passenger (6 Tr. 112-113, 117, 120, 126-127). Although the expenses were charged to "education and publicity" at petitioner's direction, the woman's transportation had no connection whatsoever with union activities (5 Tr. 21; 6 Tr. 118, 121).[1]

In May 1975, while attending an AFL-CIO convention, petitioner and other union officials assaulted a hotel employee during a dispute with him (15 Tr. 197). As a result, the victim filed a civil lawsuit against petitioner and the other union officials in their individual capacities (15 Tr. 31-33; 17 Tr. 32). Petitioner executed a $6,000 check drawn on the union's account to settle the lawsuit. He did not, however, seek authorization for the disbursement, nor did he report it to the membership (14 Tr. 155).

2. At the conclusion of the trial, the district court, in compliance with petitioner's request, gave the jury the following instruction concerning the elements of a violation of 29 U.S.C. 501(c) (19 Tr. 202-203, 206-207):

> The elements of Section 501(c) of Title 29, United States Code, which the Government must prove beyond a reasonable doubt as to each defendant named in Counts II through XVI are as follows:
>
> * * * * *

---

[1]The record does not support petitioner's suggestion (Pet. 20) that he authorized the expenditure of travel costs at the behest of the mutual acquaintance to permit the woman to audition for a role in a drama sponsored by a local civic association. The person who introduced the female passenger to petitioner expressly denied that she ever suggested to petitioner that the expenditure would benefit the civic association with which she was employed (17 Tr. 51).

> Fifth, that there was a lack of proper and bona fide authorization for the expenditures or that there was a lack of benefit to the labor organization from the expenditures; and that the defendant lacked a good faith belief that the expenditure was authorized or that it would be ratified and that the defendant lacked a good faith belief that the expenditure was for a union purpose or benefit.
>
> * * * * *
>
> As to the fifth element, that is, that there was a lack of proper and bona fide authorization for any or all of the expenditures referred to in Counts II through XVI, you may consider whether any record or evidence of authorization exists as to any of the expenditures.
>
> The question of whether union expenditures are properly authorized must be considered by you in the context of the union's constitution and resolutions adopted thereunder.
>
> If you find that the union's record pertaining to a particular expenditure or expenditures as charged in Counts II through XVI of this indictment contain false entries or statements as to the purpose for the expenditure or expenditures, you may consider this as evidence that the expenditure or expenditures were, in fact, unauthorized.

Following this instruction, the jury returned guilty verdicts on three counts alleging violations of 29 U.S.C. 501(c).

On appeal petitioner argued that the government's evidence relating to these counts was insufficient to establish that he lacked union authorization to make the expenditures. Relying upon its decision in *United States* v. *Thordarson*, 646 F. 2d 1323 (9th Cir. 1981), petition for cert. pending, No. 81-643, the court below held that lack of

authorization is not an essential element of a violation of 29 U.S.C. 501(c). It thus did not address the sufficiency of the evidence with respect to such a requirement (Pet. App. A3-A4).

ARGUMENT

Petitioner contends (Pet. 5-22) that the court of appeals erred in holding that lack of union authorization is not an essential element of a violation of 29 U.S.C. 501(c). As we explain below, the court correctly construed that statute; but in any event, review of its construction would be unwarranted in this case because the trial judge in fact instructed the jury that it must find lack of union authorization in order to convict petitioner, and the conviction was supported by ample evidence on that point. Thus, regardless of the merits of petitioner's statutory argument, his conviction was properly affirmed, and this is plainly an inappropriate vehicle for resolving any conflict that may exist in the formulations used by different circuits to describe the government's burden of proof in Section 501(c) prosecutions.

1. Under the trial court's instructions (pages 3-4, *supra*), the jury was required to find that the disbursements concerned in the three counts on which it convicted petitioner were not authorized by the union. The evidence supporting that finding was more than adequate. Petitioner failed to explain that the disbursements were for a person who had no connection with union activities, and through false document entries, petitioner concealed facts concerning the hotel reservation and airfare payments, *e.g.*, the sex of the person for whom they were made. He thus deprived the union of any basis on which a knowing authorization of these asserted "education and publicity" payments could have been made. Regarding the $6,000 paid to settle the civil

suit brought against petitioner by the hotel employee, petitioner admitted that he did not ask the union membership to authorize this expense (14 Tr. 155).[2]

2. In any event, the holding of the court below that lack of union authority is not an essential element of a Section 501(c) offense is correct. As the court of appeals explained in *United States* v. *Thordarson, supra*, 646 F. 2d at 1334, quoting *United States* v. *Marolda*, 615 F. 2d 867, 872 (9th Cir. 1980) (Larson, Senior District Judge, concurring), "Congress in enacting § 501(c) 'was merely transmuting common law theft crimes involving union funds and committed by union officers or employees into Federal crimes.' " The legislative history of Section 501(c) contains no evidence that, in enacting this provision, Congress intended to add any new elements to the common law theft offenses except those necessary to show federal jurisdiction and the defendant's status as a union official or employee (*id.* at 1334-1335).[3]

---

[2]Evidence was introduced during the trial to show that the union membership ratified an Executive Board resolution authorizing the expenditure of union funds for payment of attorney's fees in connection with *criminal* proceedings resulting from the assault, in order to avoid any civil suit against the *union*. The court below found that petitioner's tactics in obtaining membership approval of the resolution were "in contravention of union procedures to forestall objections by the union membership" (Pet. App. A4, see, *e.g.*, 9 Tr. 72-74; 10 Tr. 110-114). In any event, the resolution provided no authorization whatsoever for a disbursement to settle the civil suit subsequently brought against petitioner in his individual capacity (16 Tr. 105-106; GX 6-19 (Appendices 3-4 to the government's brief in the court of appeals)).

[3]For example, as the *Thordarson* court noted, the Senate Minority Report on S. 1555 states that Section 109(a), the precursor of Section 501(c), added nothing to state embezzlement and theft offenses and simply made those state crimes federal offenses when they involved union officials and union funds. 646 F. 2d at 1334 n.21, citing S. Rep. No. 187, 86th Cong. 1st Sess. 97 (1959).

Thus, "[a]lthough the scope of criminal liability under § 501(c) extends beyond the common law offense of larceny and the old statutory crime of embezzlement, the essence of the § 501(c) crime, like the older crimes of embezzlement and larceny is the 'tak[ing] [of] another's property . . . knowing that the other person would not have wanted that to be done.' " *United States* v. *Thordarson, supra,* 646 F. 2d at 1333, quoting *United States* v. *Silverman,* 430 F. 2d 106, 126-127 (2d Cir.), modified on other grounds, 439 F. 2d 1198 (1970), cert. denied, 402 U.S. 953 (1971). The government therefore need only prove, in addition to the jurisdictional elements, that the defendant converted union property with fraudulent intent. 646 F. 2d at 1335; see *United States* v. *Durnin,* 632 F. 2d 1297, 1300 & n.5 (5th Cir. 1980). As Judge Larson explained in *Marolda,* 615 F. 2d at 873, the presence or absence of union authorization is simply relevant evidence on the issue of fraudulent intent.[4] In some cases, of course, proof of fraudulent intent may be virtually impossible to make out without a showing of lack of authorization,[5] but this does not mean that the

---

[4]The floor debate statement by Senator Kennedy quoted by petitioner ("[u]nion officers will not be guilty of a breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and by-laws or by resolution of the executive board, convention, or other appropriate governing body * * *" (Pet. 16, quoting 105 Cong. Rec. 17900 (1959)) is not necessarily inconsistent with the view that although authorization may negate fraudulent intent, it is not a separate element of the offense.

[5]Thus, for example, in *United States* v. *Goad,* 490 F. 2d 1158 (8th Cir.), cert. denied, 417 U.S. 945 (1974), holding, as to unauthorized salary increases for union officers, that "if the Government establishes fraudulent intent and lack of proper authorization, it should not also be saddled with an additional burden of proving lack of benefit to the union" (490 F. 2d at 1165). The authorization question was obviously critical to fraudulent intent. The circumstances would be rare indeed in which an employee could be found to have acted with such intent in accepting a properly authorized salary increase for his services. In the

latter must be alleged and proven as a distinct element of a Section 501(c) offense.[6]

---

case of the personal expenditures here for petitioner's female acquaintance and for settlement of the suit brought against petitioner in his individual capacity, however, fraudulent intent could well be made out even if "the union went through the form of authorization." *United States* v. *Silverman, supra,* 430 F. 2d at 127.

[6]Although petitioner contends that the circuits are in conflict on the question whether lack of union authorization is an element of a Section 501(c) offense, he has cited no authority holding, contrary to the court below, that in order to obtain a conviction under this Section the government must allege and prove such facts.

As the *Thordarson* court noted, 646 F. 2d at 1336 n.24, there is some support in the decisions of several circuits for the proposition that there are additional essential elements of a section 501(c) offense beyond those delineated in *Thordarson.* None of the decisions cited by the *Thordarson* court in this connection (*ibid.*), however, supports petitioner's contention that the government must always establish lack of union authorization in a Section 501(c) prosecution. For example, in *United States* v. *Bane,* 583 F. 2d 832 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979), a decision on which petitioner apparently relies (Pet. 15), the court held that even where authorization of an expenditure has been shown, the government may still prove a Section 501(c) offense by proving "the expenditure was [not] for the legitimate benefit of the union." 583 F. 2d at 835-836.

As the *Thordarson* court also correctly observed (646 F. 2d at 1336 n.24), the cases referring to additional "elements" of a Section 501(c) offense have arisen not from dismissals of indictments but from post-conviction appeals. They have accordingly turned on such questions as sufficiency of proof in light of evidence produced by both the government and the defense. In such inquiries, the question of the "elements" of the offense tends to be somewhat obscured.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DE PUE
Attorney

OCTOBER 1981

DOJ-1981-10